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polar interview technologies of truth law inequalities

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SPILLOVER CONVERSATION

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Interview: Technologies of Truth, Law, and Inequalities

As part of the *Political and Legal Anthropology Review* (PoLAR) virtual issue, *Law and Inequalities: Global and Local*, Digital Editorial Fellow Sean Mallin [SM] interviewed Susan Bibler Coutin [SBC] and Sally Engle Merry [SEM] regarding the trajectories of their work in relation to law and inequalities.[1] In doing so, their discussion covered a number of conceptual issues related to developments in socio-legal research more generally.

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SM [to SBC and SEM]: Thank you for agreeing to this interview. My questions try to bring some of the themes in your joint American Ethnological Society (AES)/Association for Political and Legal Anthropology (APLA) Presidential Address last year, entitled "Technologies of Truth in the Anthropology of Conflict," into conversation with the theme of the 50th anniversary meeting of the Law and Society Association, which is "Law and Inequalities: Global and Local."

Your Presidential Address offers insights into some of the questions and challenges, both global and local, facing scholars today. We wonder if you both could start with a few words about how you think further study of technologies of truth—especially in contexts of the "new governance," as you call it—can shape how scholars in law and the social sciences approach the study of inequality?

SBC: Thank you for posing this question. As Sally and I developed at greater length in our article in *American Ethnologist*, technologies of truth associated with new forms of governance produce versions of reality that are deemed definitive but that also reflect the perspectives of more powerful groups. In our article, we define new governance as "a shift from a command-

and-control strategy of governance to collaborative, consensus-building discussions focused on problem solving and improvement…. In contrast to earlier systems, which relied on rules and punishments, new governance relies extensively on 'soft law' in that it shapes behavior by establishing standards; requiring individuals, groups, corporations, and even nations to report on how they have met them; and comparing results" (Merry and Coutin 2014:2).

Technologies of truth are essentially systems of measurement, evaluation, and assessment. Members of marginalized groups are often the subjects or objects of these systems, rather than the designers of these technologies. As a result, modes of assessment may employ criteria or collect data that does not reflect their social realities. For example, an unauthorized immigrant who is seeking status in the United States may be asked to provide documentation of continuous presence in the United States even though the very condition of being undocumented, especially if coupled with other forms of disadvantage, such as being a domestic violence victim, may preclude generating the sorts of evidence (pay stubs, bank statements, school records) that are required.

To me, one of the most interesting issues that Sally and I began to explore is whether these new forms of governance are producing new sorts of legal subjects. Immigration scholars have highlighted the degree to which U.S. immigration law is increasingly producing liminal statuses that are equivalent neither to being undocumented nor to lawful permanent residency or citizenship. Immigrants who have been granted temporary protected status or deferred action do not enjoy the same legal rights as lawful permanent residents. They face travel restrictions, they cannot petition for their family members, their eligibility for public benefits is limited, they are not on a pathway to citizenship, and their ultimate legal fate is uncertain. Proposals for Comprehensive Immigration Reform would create a new liminal status known as "Registered Provisional Immigrant" status, but this would be linked to the United States' ability to meet certain border enforcement "triggers," and also would require applicants to maintain a clean criminal record and comply with other immigration-related requirements. So, new technologies of truth also entail the creation of new forms of liminal subjectivity.

SEM: One of the issues that Susan and I are centrally concerned with is the power embedded in constructing categories and identities through law and systems of measurement. Counting the number of people who have experienced violence in interpersonal relationships, for example, provides knowledge about violations that determines who receives help and who does not as well as how and where the state chooses to intervene. Interrogating who is developing the categories and carrying out the enumeration is a critical part of exploring how these technologies exercise power. Those who control the counting control the knowledge. In effect, they define the problem and its solution.

The knowledge production of quantification is largely the work of experts, typically those with education and experience in data collection and analysis. Those being measured are rarely if ever consulted about the relevant categories of counting and modes of analysis. Thus, through this subtle process of quantification, inequalities in social position are translated into inequalities in how the social world is understood.

Since this knowledge is increasingly the basis for policy and decision-making, the current enthusiasm for evidence-based governance can exacerbate inequalities. On the other hand, quantification can also expose inequalities in a particularly powerful way. This is a technology with power that can both exacerbate or diminish inequality. It is available, albeit unequally, to those who are able to harness it.

SM: You both bring up really interesting points about the production of new legal subjects through technologies of truth. In a way, it reminds us of some of your earlier work on working-class engagements with local courts (*Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*) and the struggles of Salvadoran immigrants as they negotiate U.S. immigration law (*Legalizing Moves: Salvadoran Immigrants' Struggle for US Residency*). Both books underline the importance of examining how people understand and experience law. We were wondering if you could talk about the place of earlier work on legal consciousness in light of more current interest in legal subjectivity? Do you see legal subjectivity as distinct from legal consciousness? How so?

SBC: This is an important question. Socio-legal scholars often use the term legal consciousness to refer to attitudes toward the law, for example, to whether individuals see law as majestic, as accessible, as establishing rules that individuals can manipulate, as beyond reach, and so forth. Some turn to Patty Ewick and Susan Silbey's book, *The Common Place of Law*, as a key resource in thinking about legal consciousness. Additionally, the notion of legal consciousness has been important for scholars who are interested in disputing and particularly in whether or not disputants are willing to turn to law (versus informal mechanisms or even "lumping it") to resolve their dispute.

When I was working on *Legalizing Moves*, I had been very influenced by Foucault and therefore was interested in analyzing the set of practices that constituted individuals as legal subjects within immigration categories, particularly given that immigration law has been made pertinent to an increasing number of contexts outside of formal legal settings (e.g., applying for a job, applying for college, seeking medical care, opening a bank account). My thinking was that the understandings of law that were articulated by such subjects reflected this set of practices and thus provided insight into the workings of immigration law.

By "understandings" I did not mean individuals' attitudes toward law or their "consciousness," but rather their explanations of law's functioning. So, for example, Central Americans with pending immigration cases in the United States seemed to see status as inhering in documents rather than in persons. This interpretation of law seemed to reflect their experience of being asked for documents, and therefore was accurate, even though it differed in key ways from that of attorneys and officials who saw documents as evidence of status rather than as status itself, and who were also correct (so this was not a case of law "on the books" differing from law "in action," but rather of law itself being multidimensional). For me, focusing on subjectification and subjectivity was a way of understanding law as a disciplinary system.

SEM: I agree with Susan that this is an important question. The concept of legal consciousness has been very productive, but it is also a difficult and confusing term. It has Marxist origins, developing from the question of why people go along with systems of inequality in which they

are disadvantaged. It has also been used to simply describe attitudes toward the law. My use of the term is closer to legal subjectivity: how a person's sense of self is shaped by law. Seeing oneself as endowed with rights is a dimension of legal consciousness. Thus, legal consciousness describes the way an individual conceives of his/her relationship to the law and how that shapes who he/she is.

For example, the battered women I met in my research in Hawai'i were encouraged to use the courts to prosecute their abusers. This meant forging a new relationship to the law as capable of endowing the survivor with rights. Legal consciousness changes with experience. If a person turns to the courts for help with domestic violence, for example, and the court responds with a powerful and effective intervention, the person may change her legal consciousness as a result of this experience, deciding that she has a right not to be hit. On the other hand, if the court treats the complaint dismissively, the person's legal consciousness may shift to the view that these rights are weak or meaningless and that she cannot contest the abuse she suffers.

Legal consciousness is different from legal culture in that it is held by individuals and shaped by experience. However, it is a product of legal culture in that it is acquired from surrounding cultural assumptions about law, rights, and justice. Thus, the individual acquires a legal consciousness from his culture, but adapts and changes this understanding of himself with experience. Since culture is not a simple, homogeneous system but a repertoire of ideas, practices, and strategies, it offers opportunities for reevaluation and change with experience. Finally, I also differentiate legal consciousness from legal mobilization, which is the use of law as a technique of social action. In practice, these concepts are frequently related, but it is useful to keep them analytically distinct.

SM: Your AES/APLA address taps into the growing interest in anthropology on questions of transparency and bureaucracy. One way to approach these questions is through engaging with so-called experts in the classic mode of "studying up" which, in a way, involves extending the analytic of "legal subjectivity" to those creating or enforcing law. What suggestions do you have for scholars interested in studying law and policy, especially when some of the actors involved may be difficult to reach? How do you think critical engagement with expertise contributes to understanding inequality?

SEM: This question addresses two critical issues in the contemporary study of law and anthropology. The first is the importance of expertise in controlling not only law and its use, but also the production of knowledge about law and governance more generally. In my work on quantification, it is clear that governance is increasingly dependent on metrics, which are produced by the same practices of categorization and generalization that underlie the operation of law. Yet, these processes of commensuration and categorization are even more opaque to the public than the classification and analysis that take place within the law.

Unequal power in constructing such knowledge contributes in significant ways to maintaining inequalities. It is typically elites who construct measures and often the poor and marginal who are the targets of counting. The latter generally have little say about what is counted and how it is classified. We need scholarly research on the ways quantified knowledge is produced and its underlying cultural and interpretive work as well as greater skepticism and sophistication about

numbers by those who use indicators. I am finishing a book that addresses these questions, but there is a great deal more work that needs to be done.

The second critical question concerns access. As anthropologists shift from studying small communities that are relatively powerless to focusing on elites, access becomes far more problematic. I have encountered several cases recently in which anthropologists studying powerful institutions and actors had great difficulty getting access to individuals and institutional settings. Even if an anthropologist is allowed to attend meetings, this does not mean she will have access to private, informal conversations. This kind of research on bureaucracies and governing institutions is of critical importance in understanding core anthropological problems such as inequality and power. There are no easy answers here beyond persistence and luck, but it is an issue we need to confront.

SBC: Additionally, of course, it is important to recognize that "up" and "down" are quite complicated and that there are multiple forms of expertise. For example, a paralegal may hold tremendous expertise regarding the practice of immigration law, an undocumented immigrant who now works as a janitor may have studied theology in his or her country of origin, and (and, this is a classic law and society idea) law can be created and enforced through the ongoing practices of the individuals who are the targets of policies.

Regarding the issue of reach, I have found that individuals in powerful positions have been willing to meet and talk with me when the focus of my research turns out to be near and dear to them. For instance, at a time when the Salvadoran government was attempting to forge new relationships with Salvadorans living in the United States, high-level Salvadoran officials were willing to meet with me to share their perspectives on the Salvadoran immigrant community here. Likewise, high-level US officials were willing to talk to me about policy innovations regarding Central American immigrants. One challenge is that if one is attempting to reach multiple groups and sectors, particularly in different geographic locations, then it can be hard to access the sorts of informal conversations and settings that Sally refers to above. Sometimes, gaining more in-depth access to one group or sector can preclude working with or entering another.

Regarding law and inequality, one important contribution of conducting anthropological research in powerful settings is that it quickly becomes clear that the actors in these settings are complex persons who often have good intentions and who may share some of the training and theoretical vocabulary of anthropologists and other scholars. I remember, for example, when a Salvadoran official pointed out to me that El Salvador had become transnational and that the state had to redefine itself accordingly. From outside of powerful settings, it may appear that powerful actors either have too much agency (e.g., that they can set policies as desired) or almost none (if policies are attributed to structures). Examining expertise helps to shed light on the forms that action (and inaction) takes, and the roles of technologies, records, forms and material histories in shaping or channeling law and policy.

SM: You both raise some interesting points about how anthropology and socio-legal studies can illuminate important power dynamics, particularly as law interacts with forms of knowledge, "objective" standards being some such form.

To conclude our interview, I would like to ask you both about the use of "scientific" methods and research in law. There is a long history in which law has been viewed as (or aspired to be) a science. This view of law was critiqued by the legal realists and later by a range of sociolegal scholars. The current situation you describe in your address seems less about a return to this view of law as science and more about law engaging in new ways with science or scientific methods such as statistics. Could you talk a bit more about how you both see this relationship between law and science—either law as science or law's use of science or something distinctly different? What new problems do you see being posed by this relationship?

SEM: I would like to shift the question a bit. I share the legal realist view that law is not a science and that it does rely on science to some extent. But, I think one of the interesting features of law is the way it works in ways that are parallel to science, specifically to statistics. Scientific knowledge, including statistical knowledge, consists of ordering the world into categories and patterns of categories. These are of course subject to debate and change. Law similarly, but through a different process, is continually engaged in constructing categories and in assigning cases to these categories. Like science, these categories are arranged into patterns that provide explanations, in our case of social life. Thus, both are engaged in knowledge production as a central activity and use processes of comparison and systematization to do so. However, the source of authority is somewhat different, with science claiming its credibility based on facts and law on the logic of the categories.

Bruno Latour has usefully compared processes of legal decision-making with scientific discovery, but it seems to me that this is a complicated question that warrants careful attention. For example, the processes vary depending on which part of the system one considers; it does not make sense to compare elite appellate courts with everyday scientific laboratories. There are clearly processes of producing truth, including through rules of evidence, in both law and science. Comparing and contrasting these processes is an important project for legal anthropologists, particularly as claims are made that law is an empirically based field as articulated by the empirical legal studies project. Examining law as a cultural system with its own logics about how to construct knowledge seems an important project and one that opens up the law for further critical scrutiny.

SBC: I agree with Sally. Whether or not we define law as a science, the tools that Science and Technology Studies (STS) used for studying science sociologically can also be applied to the study of law and legal processes. It is possible to examine how truth claims are formulated in particular legal contexts, what counts as evidence, the logic of assembling a file in a particular fashion, which aspects of documents are deemed important for particular purposes, how documents and files circulate, and the various sorts of expertise that are created, deployed, and assessed in legal settings.

Importantly, though, the phenomena that Sally and I analyzed in our piece are not only legal in nature. They also are what we've referred to as techniques of new governance, that is, forms of measurement designed in part to shape behavior by establishing metrics and standards. Thus, according to the memo through which it was created, the Deferred Action for Childhood Arrival program (DACA) identifies immigrants who are considered to be a low enforcement priority due to their age when they entered the country, the many years they lived in the United States, and

their educational achievements. To determine whether DACA requestors qualify, adjudicators have had to determine what counts as evidence of continuous presence, and whether circumstantial evidence will be accepted as proof of meeting the DACA guidelines. As I mentioned above, a new problem that is posed by studying the ways that claims are constructed and evaluated is to identify the sorts of subjects are being created within these knowledge systems as well as how these subjects may contrast those of liberal law.

SM: Thanks for the thought-provoking responses. As you both show, questions about the relationship between law and inequality cross jurisdictions and scales, from legal aid clinics to the offices of the United Nations. The "technologies of truth" that you highlight in your AES/APLA Presidential Address allow for the movement of the "new governance" practices into new areas of social and legal life. You also show how ethnography can be a powerful tool in revealing how these processes have intended and unintended consequences, including unanticipated dilemmas that emerge when categories fail. Yours is a powerful call for more empirical research into the role of law in addressing and perpetuating inequalities, both local and global. Thank you again for speaking with us.

Notes

[1] Many thanks to Kate Henne and Stacy Topouzova for their assistance in developing questions for this interview. Recommended citation: Coutin, Susan Bibler, Sean Mallin, and Sally Engle Merry. "Technologies of Truth, Law, and Inequalities." Interview. PoLAR: Political and Legal Anthropology Online, 12 June 2014, http://www.polaronline.org/virtual-issues/interview-coutin-merry/

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